THE UNIVERSITY OF SYDNEY

**Professor Ben Saul** BA(Hons) LLB(Hons) *Sydney* DPhil *Oxford*
Professor of International Law
Sydney Centre for International Law

United

Nations Human Rights Committee
c/o Petitions and Inquiries Section
Office of the High Commissioner for Human Rights
Palais des Nations
CH-1211 Genève 10
Switzerland
By email: petitions@ohchr.org

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Dear Committee

**Authors' Comments on Australia's Response to the Committee's Views in Communication Nos. 2094/2011 (*FKAG v Australia* (2013)) and 2136/2012 (*MMM v Australia* (2013))**

The authors have considered Australia's response to the Committee's Views in these communications, dated 17 December 2014, posted by the Petitions Unit to counsel on 12 January 2015, and received by counsel on 24 February 2015. The authors were asked to provide comments by 12 February 2015. Due to the delay in receiving Australia's response, the authors respectfully request that the Committee accept this late response.

Australia rejects the Committee's findings that Australia breached Articles 9(1), 9(2), 9(4), and 7 of the ICCPR. It rejects the Committee's interpretation of the Covenant on most issues (Article 9(2) at paras. 14-17; Article 9(4) at paras. 18-19; Article 7 at paras. 24-26). It also disagrees with the Committee's application of the law to the facts in various respects, including the arbitrariness of detention under Article 9(4).

This is accordingly one of those objectionable cases identified by the Committee in paragraph 18 of General Comment No. 33 (2008) on the Obligations of States Parties under the Optional Protocol, where the state fails to accept the Committee's Views – in this case, in their entirety. It is also an instance of what the Committee identified there as an attempt by the state to reopen legal argument, despite the state participating fully in the conduct of the proceedings prior to Views.

Australia's response is wholly unacceptable. Australia is effectively asserting a self-serving right to conclusively auto-interpret the scope of its own obligations under the ICCPR and First Optional Protocol. It cherry-picks and endorses as the law such Committee jurisprudence as supports its case, and rejects everything else. Australia's response renders largely futile the purpose of the communications procedure, which is to provide independent assessment of a state party's human rights compliance through a quasi-judicial process of authoritative external interpretation and adjudication, and a constructive response by the state party to conform to its ICCPR obligations.

Faculty of Law
Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 9351 0354
F +61 2 9351 0200
E ben.saul@sydney.edu.au
**www.law.usyd.edu.au**

ABN 15 211 513 464
CRICOS 00026A

The authors draw the Committee's attention to paragraphs 11–15 of General Comment No. 33 (2008), by which Australia is required to respect the Committee's Views as authoritative, quasi-judicial determinations of its treaty obligations, which Australia is further bound to implement in good faith:

> 11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.
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> 12. The term used in article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is "views". These decisions state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.
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> 13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.
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> 14. Under article 2, paragraph 3 of the Covenant, each State party undertakes "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity." This is the basis of the wording consistently used by the Committee in issuing its views in cases where a violation has been found: "In accordance with article 2, paragraph 3(a) of the Covenant, the State party is required to provide the author with an effective remedy. By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views."
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> 15. The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.

**The authors urge the Committee to denounce in the strongest terms Australia's comprehensive failure to respect its obligations under the ICCPR and Protocol, and to respect the authority of the Committee's Views and procedure.** As the Committee rightly concluded in its Views, it is contrary to the ICCPR to indefinitely detain refugees without charge, due process, or effective judicial protection, and in conditions which inflict serious mental harm on them (which cannot be alleviated by medical care when the fact of prolonged detention inflicts such harm).

**Correction of an Erroneous Submission by Australia**

Australia asserts (at paras. 20-21) that the Committee has misunderstood the *M47/2012* decision of the High Court of Australia. Australia is correct to claim that the author succeeded in that case on grounds that were not related to the lawfulness of detention, thus not leading to judicial release from detention (para. 20). But that is precisely because the Court did not accept the applicant's other argument in that case that his detention was unlawful and that he should be released – precisely supporting the authors' point that effective judicial protection is not available to them.

Australia's further argument that the Committee should have given greater weight to Australia's contention that the *Al Kateb* decision (upholding indefinite detention in a previous case) could be overturned is fanciful and mischievous. Australia is of course correct that the 'specific facts' of *Al Kateb* were different. But the *essential* facts are the same: namely, that – under the same statutory power at issue in *Al Kateb* – a person who has not been granted a visa to enter Australia, and who cannot presently be removed from Australia, must be held in detention pending removal (unless the Minister exercises a non-compellable, non-reviewable discretion to release the person).

As such, the authors are entitled to believe that a directly relevant, recent precedent of Australia's highest court is precisely that: a binding, determinative, final precedent. In order to ensure the stability and predictability of its case law and preserve its own authority as the final arbiter of law, the Australian High Court, like all superior courts, is extremely reluctant to disturb its own precedents, and has only done so in rare and exceptional cases over the past century of jurisprudence.

Further, in subsequent domestic court proceedings where the lawfulness of immigration detention has been challenged in other cases, Australia has insisted that *Al Kateb* reflects the settled law and should not be overturned. In the ten years since *Al Kateb*, the High Court has not accepted any of a number of opportunities presented by applicants to overturn, narrow or distinguish its earlier precedent.

**Procedural Non-Compliance with the Protocol**

The authors remind the Committee that throughout these communications, Australia has been persistently tardy in responding within the Committee's stipulated timeframes. The Committee's Views in these communications were transmitted to Australia on 20 August 2013 and Australia was requested to respond within 180 days, namely by February 2014. Australia responded in January 2015 – almost one year late. Its responses to earlier deadlines during these proceedings were also routinely very late.

Australia is amongst the best resourced of any state party to the Protocol and accordingly has little excuse for persistent non-compliance with the Committee's procedural deadlines. Procedural non-compliance is not a mere technical inconvenience in cases where authors are subject to continuing arbitrary deprivation of liberty and cruel, inhuman or degrading treatment. It also sets a very poor example for less well-resourced state parties. That Australia is involved in a large number of other communications is also no excuse, since this is a direct result of Australia's choice not to domestically implement the ICCPR (as through a bill of rights), and hence recourse to the Committee is a result of a lack of domestic remedies for rights violations.

**Conclusion**

Australia's response is dismissive of the Committee's expertise and authority, disrespectful of the Protocol procedure for human rights protection, and unbefitting of a democratic state party to the ICCPR and Protocol. Australia appears to regard its obligations under the Protocol as a thin and inconsequential procedural exercise. In these communications, from the outset Australia opposed their admissibility altogether (and lost on almost all counts); opposed every argument on the merits (and lost on almost all counts); routinely responded very late; and has now rejected the Committee's Views (on all counts, including interpretation and the application of law to the facts).

In sum, Australia's response is that it agrees with itself that it was right all along. It has wasted the Committee's precious time, and acted in bad faith given that it seemingly had no intention or willingness to consider reforming or moderating its behaviour.

Australia's refusal to respond favourably to the Committee's Views is part of a long-running, consistent pattern of non-compliance, with Australia failing to provide effective remedies in the overwhelming majority of the more than 30 Views in which adverse findings have been made against it. Australia has become a recalcitrant and pariah *par excellence* – a good example of how a mature state party committed to human rights ought not to behave under the Protocol.

I note that Australia's correspondence routinely assures the Committee of 'its highest consideration'. On the contrary, Australia's response to the Committee's Views demonstrates its very low regard for the Committee's authority, and its bad faith in implementing its obligations under the Protocol and the ICCPR. Australia has not treated the procedure as a constructive dialogue by which the state party adjusts its behaviour to bring it into conformity with its obligations. Rather, it has regarded it as an opportunity to lecture the Committee that it is wrong and that Australia is right.

In sum, the authors urge the Committee to denounce Australia's comprehensive failure to respect its obligations under the ICCPR and Protocol, and to respect the authority of the Committee's Views and procedure.

The authors finally wish to thank the Committee for its expedited handling of these communications, the thoroughness of its Views, and its concern for their welfare. They urge the Committee, through the Special Rapporteur for the Follow-up of Views and the periodic state reporting procedure and Concluding Observations, to persistently remind Australia of its obligation to remedy their situation.

Yours sincerely

**Counsel for the authors**

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